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280-814—67

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 690

RONALD CARABBIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A17) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1967. A petition for rehearing was denied on September 6, 1967. The petition for a writ of certiorari was filed on October 5, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment stated an offense.

2. Whether in conducting the *voir dire* the trial court erred in refusing to question jurors specifically concerning prejudice against gamblers.

3. Whether the instructions to the jury on the term "wilfully" were adequate.

4. Whether the hearing in the district court concerning the effect of electronic surveillance on the prosecution of this case was sufficiently broad.

5. Whether the trial judge's questioning of witnesses and his remarks incident to rulings were prejudicial.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Northern District of Ohio of knowingly making false statements in a "Special Tax Return and Application for Registry—Wagering," in violation of 26 U.S.C. 7206(1) (A. App. 4a–5a, 42a).[1] On August 23, 1965, he was sentenced to imprisonment for a period of three years and fined $5,000 (A. App. 45a). The court of appeals affirmed the conviction and approved the district court's conclusion, upon limited remand, that electronic surveillance had not in any way tainted the trial of the case (Pet. App. A1–A17).

1. The evidence at trial showed that petitioner began operations in the "numbers" business in about February 1962 and terminated that business in December 1962 (T. Tr. 8–11, 20–24, 156, 159, 162–163, 266, 270). On January 4, 1962, he filed an original application for a wagering stamp as principal covering the

[1] A. App and G. App. refer to the appellant's and government's appendices below, respectively. The trial transcript (T. Tr.) and transcript of the hearing concerning electronic surveillance conducted while the case was on appeal (H. Tr.) are also filed with the Clerk of this Court.

period ending June 30, 1962 (T. Tr. 3–4, 7, 8–11, 270–274, 297; G. App. 37b). In an application for a wagering stamp for continuation of the business as principal, which was filed on June 30, 1962 (T. Tr. 290–291; G. App. 36b), petitioner stated that he was engaged in the business of accepting wagers on his own account and that two named persons were receiving wagers on his behalf (G. App. 36b). The government showed that, during the period from February 1962 to November 1962, petitioner continuously operated his numbers business through three other agents as well (T. Tr. 18–29, 32–33, 36–37, 40–41, 45–46, 53, 57, 70–72, 77–82, 84–98, 102–104, 108–122, 126–138, 146–153, 158–162, 277–279, 293, 301, 320–322, 331–333, 335, 339–340, 352–353).

2. While the case was on appeal, the government filed a memorandum with the court of appeals stating that from January 22, 1962, to March 22, 1962, an electronic listening device had been in operation on business premises apparently under the control of petitioner and his brother. The court of appeals remanded the case to the district court for a hearing on the question whether the prosecution of the case was tainted by the electronic surveillance (Pet. App. A11–A12).

At that hearing, all of the F.B.I. agents who were connected with the installation and monitoring of the microphone placed in the Modern News & Novelty Company—the premises in question—were made available for examination (H. Tr. 92). The government had previously turned over to the court the complete log sheets kept in the course of the surveillance and

a copy was delivered to defense counsel at the hearing (H. Tr. 16, 28, 35, 45, 72, 81). During the hearing, it was brought out that correspondence relating to installation and removal of the monitoring device was contained in the F.B.I. file on the case. That file was turned over to the court for *in camera* inspection, and the court disclosed to defense counsel all the relevant portions of the file (H. Tr. 179–203, 217, 226–227, 229, 237, 244–245, 253–254, 364–367, 377, 403–405, 414, 417–418, 431).

The logs delivered to the court, which cover a period from January 31, 1962, to March 19, 1962, reflect the total information obtained by the surveillance (H. Tr. 82). As petitioner's counsel conceded (H. Tr. 423–424), an inspection of the logs revealed nothing affecting the instant case (Def.'s Exh. A; H. Tr. 66–74, 77, 79–87, 91, 104–107, 115–117, 124–126, 138–140, 257–265, 269–271, 278–280, 282–293, 297–301, 308–310, 313–318, 323–326, 330–335, 339–345, 350–351, 353–355).

Moreover, the information gained from the surveillance was not transmitted from the F.B.I. to the Internal Revenue Service or to the Internal Revenue agent conducting the investigation (Court's Exh. 4; H. Tr. 75–76, 106–107, 125–126, 139–140, 248–252, 271, 283, 293, 301–302, 310, 318–319 326–327, 335, 345–346, 354, 363, 366–367, 378–391). The Internal Revenue Service investigation resulting in the present prosecution was completely independent of the surveillance by the F.B.I. agents and did not involve the use of electronic surveillance (H. Tr. 378–402).

On May 29, 1967, the district court filed its finding of facts and conclusions of law, holding that none of the information overheard by the monitoring of the microphone at the Modern News Center was used either as evidence or as leads to evidence in the instant trial and, accordingly, there was no basis for ordering a new trial (Pet. App. A12).

ARGUMENT

The indictment charged (A. App. 4a–5a):

> That on or about the 30th day of June, 1962, * * * [petitioner] unlawfully, wilfully and knowingly, made and subscribed a United States Treasury Department Form 11–C * * * which he did not believe to be true and correct as to every material matter in that [he therein stated that he] * * * had two employees and/or agents receiving wagers in his behalf, whereas, as he then and there well knew and believed he had a greater number of employees and/or agents receiving wagers in his behalf.

There is no merit to petitioner's contention (Pet. 15–21) that the indictment does not state an offense under 26 U.S.C. 7206(1). Contrary to petitioner's assertion, the indictment did not charge petitioner with making false statements concerning future events. Form 11C—a Special Tax Return and Application for Registry-Wagering—was filed by petitioner on June 30, 1962, to obtain for the fiscal year beginning July 1 a wagering tax stamp covering an existing and continuing business. Question number five on that form required the registrant to state whether he was then engaged in the business of accepting wagers on his

own account, the number of employees and/or agents then engaged in receiving wagers on his behalf and the name and address of such employees or agents.[2] The question on the form is plainly framed in the present tense. Petitioner entered the names of two agents receiving wagers on his behalf on June 30, 1962, although, he had at least three other agents receiving wagers on that date. The form called for information concerning an existing situation and petitioner answered falsely.[3]

2. On the *voir dire* the court read the indictment to the jury and then conducted an extensive inquiry of the jurors concerning their ability to decide the case on the evidence presented without prejudice (T. Tr. 1–23). After explaining fully what was meant by predisposition and prejudice, the court asked the jury if, keeping in mind the nature of the case, any juror felt any predisposition of mind to decide one way or the other (T. Tr. 14–15). He received a negative response. In these circumstances there is no merit to petitioner's complaint that he was prejudiced because the trial court declined specifically to inquire whether the jurors were prejudiced against gamblers (Pet. 21–24). It is clear from the entire *voir dire* that the

[2] This fact distinguishes this case from *Kolaski* v. *United States*, 362 F. 2d 847 (C.A. 5), which petitioner asserts is in conflict with the decision below. In *Kolaski* the indictment charged false statements relating to future operations.

[3] Whether petitioner could have refused to answer that question on Fifth Amendment grounds is not relevant. Having made the choice to answer rather than claim his privilege, he is subject to prosecution for answering falsely. *Dennis* v. *United States*, 384 U.S. 855, 866, and cases cited.

jury fully understood the nature of the charge and affirmed their ability to decide the case without predisposition or prejudice attributable to petitioner's occupation.

3. Petitioner's assertion that the charge on the question of wilfulness was inadequate (Pet. 24–28) is without basis. The court instructed the jury in pertinent part as follows (T. Tr. 384, 386):

> To do an act wilfully, as used in the statute, means that the act was committed by the defendant voluntarily, with knowledge that it was prohibited by law, and with the purpose of violating the law and not by mistake, accident or in good faith. An act is done knowingly when it is done voluntarily and purposely, and not because of mistake or accident.
>
> * * * * *
>
> As I stated previously, before you can find the defendant guilty you must be satisfied, beyond a reasonable doubt, that the defendant wilfully, knowingly and falsely swore to the matters charged. If you find that the intention to swear falsely did not exist or that he believed he had correctly stated the number of employees and/or agents accepting wagers on his behalf, and you find that such belief was an honest belief and he had reasonable ground for this belief, then you must find the defendant not guilty.

The first part of the instruction is one commonly given to define the concept of wilfulness (see, *e.g.*, Seventh Circuit Judicial Conference, *Manual on Jury Instructions in Federal Criminal Cases*, 33 F.R.D.

523, 553–555), and the second part was given exactly as requested by petitioner (T. Tr. 400).

4. Also without merit is petitioner's contention that the hearing concerning the use of electronic surveillance was unduly restricted (Pet. 28–34). The record shows that the court made a thoroughgoing inquiry into the effect of electronic surveillance upon the investigation and prosecution of the instant case. The government disclosed the only electronic surveillance that could have affected petitioner and produced all pertinent records in connection therewith. All personnel significantly connected with the operation appeared for examination. The witnesses and records established that the electronic surveillance had no impact on this case. Indeed, petitioner's counsel conceded as much. Petitioner's attempts to force broader production of government files and the appearance of administrative officials having only the most tenuous connection with the subject matter of the inquiry were properly denied.[4]

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[4] The implication that broad, unrestricted discovery is justified in the instant case because of demonstrated bad faith of the government in the disclosures made (Pet. 30–33) is based on a distorted statement of the record. For example, FBI agent Peterson testified to the effect that the electronic surveillance and its product were not communicated to the Internal Revenue Service (Pet. 33). Court's Exhibits 4, 4A, and 4B, cited by petitioner as demonstrating otherwise, do not involve communications with IRS concerning any electronic surveillance or information therefrom. Similarly, petitioner intimates that the government's representation that the log sheets were the only original record of the surveillance was false (Pet. 31–32); however, as amply indicated from the record, the logs were the total original records of the extent of the surveillance as an information source—these were the total operational logs of the surveillance. When

5. There is no merit to petitioner's suggestion that the conduct of the trial judge in questioning certain witnesses indicated bias or prejudice (Pet. 34–40). The most extensive examination of any witness by the court was that of Andrew Kosco (T. Tr. 47–57), an examination conceded by petitioner at trial to have been for the purpose of clearing up confusion on a particular point (T. Tr. 68). Similarly the court's remarks to a witness not to be too concerned about not knowing the difference between a Form 730 and other tax forms (Pet. 37) obviously have no connotation of bias against petitioner when read in context (T. Tr. 136). Likewise, the court's examination of William Gaul (T. Tr. 148–151), quoted by petitioner (Pet. 38–40), on its face indicates an attempt to clear up confusion in the testimony and, significantly, did not strike counsel as worthy of objection at the time. Finally, even the most cursory reading of agent Relic's testimony on rebuttal (T. Tr. 350–353) shows that it was aimed directly at petitioner's contrary testimony (T. Tr. 283–286, 293, 305–307, 320–322, 324–327) and was not a "surreptitious" endeavor to rebut the testimony of the government's own witness (Pet. 40).

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petitioner later insisted on production of the administrative file which contained nothing concerning what information had been obtained from the surveillance, it was given to the court for such use as deemed necessary after *in camera* inspection. The administrative file did little more than confirm what had already been disclosed in the government's memorandum in the court of appeals—that the monitoring device was installed from January 22, 1962 to March 22, 1962. Certainly no bad faith in disclosure was demonstrated by petitioner.

The trial judge did no more than appropriately intervene on occasion to clear up confusion and to keep the inquiry within reasonable bounds. *E.g., Knapp* v. *Kinsey,* 232 F. 2d 458, 466 (C.A. 6), certiorari denied, 352 U.S. 892; *United States* v. *Brandt,* 196 F. 2d 653, 655 (C.A. 2). Moreover, the court unequivocally instructed the jury not to consider statements, arguments and conduct of counsel or the court in determining petitioner's guilt or innocence (T. Tr. 392–394, 397). There is no reason to believe that those instructions were not followed.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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